No. 73-66

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SCHOLLE CHEMICAL CORPORATION, ET AL.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

JEROLD S. SOLOVY
HOWARD R. BARRON
JOHN G. STIFLER
ARTHUR M. SUSSMAN
DOUGLAS C. NOHLGREN
DIANE M. KINNARD
Attorneys for Petitioners

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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The Brief of the National Labor Relations Board does not dispute the two principal points advanced in Scholle's Petition. The Board concedes, as it must, that ". . . this is the first case since *Babcock* [351 U.S. 105 (1956)] to hold that an employer, other than a self-contained facility, must permit non-employee organizers access to his property for the purposes of organizational activities . . ." (Brief In Opposition, 8.) Nowhere in its Brief does the Board dispute that the decision of the Seventh Circuit in this

case conflicts with that of the Eighth Circuit in *Central Hardware Co.* v. *NLRB,* 468 F.2d 252 (8th Cir. 1972), *on remand from* 407 U.S. 539, which squarely placed the burden of proof on the union, not the employer, to demonstrate the "inaccessibility" of company employees.

By characterizing this case as involving only the issue of "substantial evidence" supporting the Board decision (Brief in Opposition, 1-2, 7, 9), the Board seeks to avoid the clear and unmistakable thrust of the Seventh Circuit's opinion. If permitted to stand, the decision will open every plant in a typical industrial setting to union solicitation. The decision of the Seventh Circuit directly conflicts with constitutional guarantees protecting the right of private property.

The so-called requirements for establishing "inaccessibility," as defined by the Seventh Circuit, would be met in every instance where a plant is located in a typical industrial setting. The distribution of handbills from public property was held "impracticable" because of traffic and the inability to identify particular Scholle employees. This would be true in any industrial setting; even if vehicular traffic were not heavy, passers-by on a sidewalk could not be distinguished from plant employees, who may use several plant exits. The regional dispersal of employees, held by the Seventh Circuit to render billboards and TV or radio appeals fruitless, is likewise characteristic of most industrial situations. While the Board relies upon the existence of only a "partial list" of Scholle employees in possession of the Union (Brief In Opposition, 8), this list in fact contained the names and addresses of over 60% of the Scholle work force and, with minimum effort, could have been completed. But the Union preferred to file a charge with the Board rather than complete the list.

The result of the Seventh Circuit's decision is that the premises of virtually every industrial plant in the United States will be open to union solicitation campaigns, even though the union has made only a minimal effort to contact the employees by means other than use of the company's private property.

Contrary to the Board's position (Brief In Opposition, 6), *Babcock* cannot be read as a mere neutral balancing of the union's right to organize, as opposed to the employer's right to control the use of its property. The principal interest to be protected is the employer's private property right. This Court held in *Babcock* that this constitutional right can be abrogated only in the unique case where solicitation on private property is required and reasonable alternatives are not available.

Any doubt about the primary importance to be afforded to the constitutional right to protect one's private property was laid to rest in *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), where this Court, relying on *Babcock*, upheld the right of a property owner to exclude nonemployee union organizers from a shopping center parking lot. This was held to be consistent with "long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

The decision of the Seventh Circuit cannot be permitted to stand. Failing review by this Court, *Babcock* and *Central Hardware* will have been effectively reversed and unlimited union solicitation on private property will be permitted as a matter of course in virtually every industrial plant in the country. This result will follow even though

the union has adequate means to further its organizational efforts without resort to the use of private property.

For the reasons set forth in Scholle's Petition and in this Reply, petitioners respectfully urge that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JEROLD S. SOLOVY
HOWARD R. BARRON
JOHN G. STIFLER
ARTHUR M. SUSSMAN
DOUGLAS C. NOHLGREN
DIANE M. KINNARD
Attorneys for Petitioners

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

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